

# **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1926**

**No. [REDACTED] 155.**

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**BEN E. HAYMAN, APPELLANT,**

**vs.**

**CITY OF GALVESTON, BAYLISS E. HARRIS, J. E. PEARCE,  
ET AL., ETC.**

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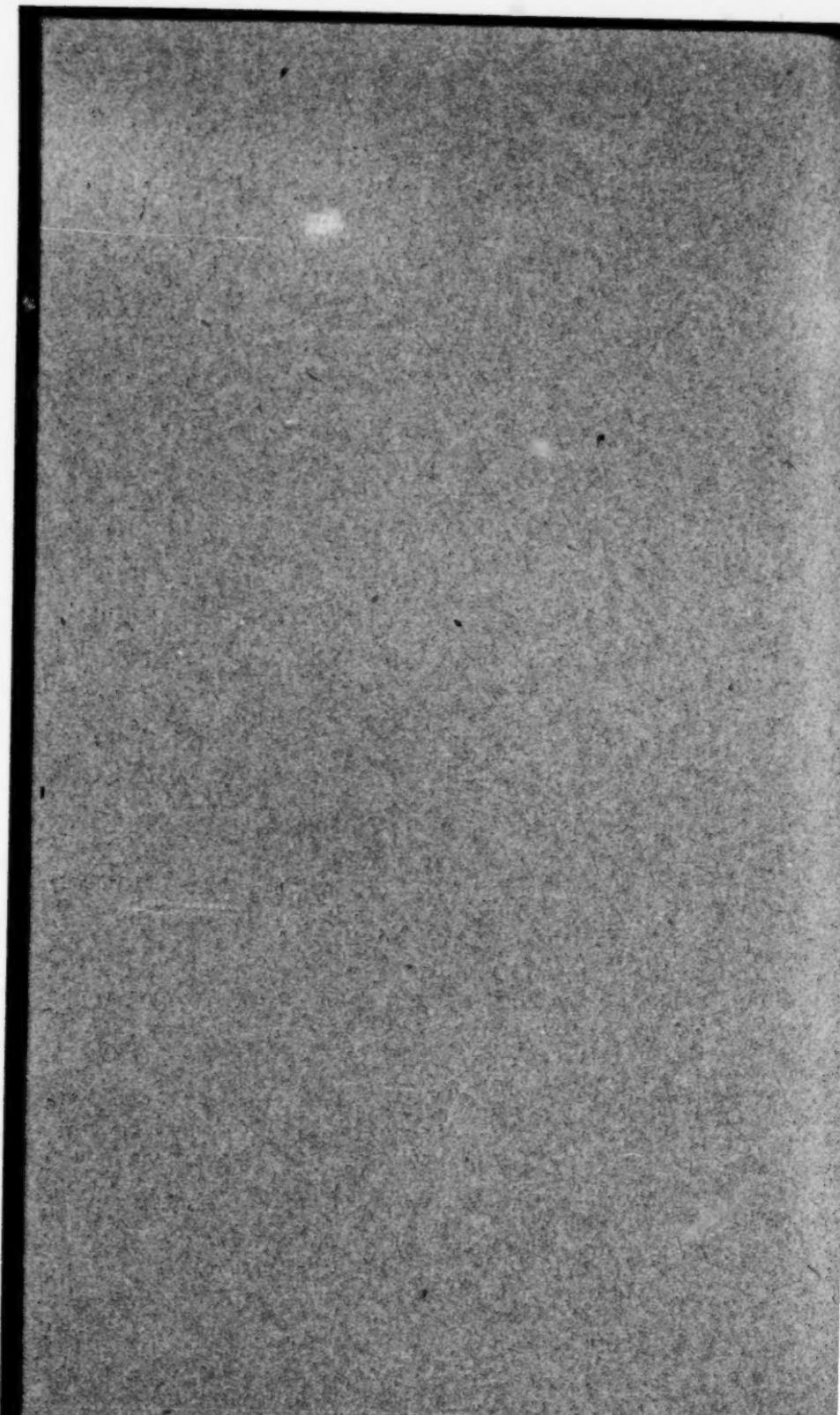
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF TEXAS**

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**FILED JUNE 29, 1926**

**(81,291)**



(31,291)

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1925.

No. 568

BEN E. HAYMAN, APPELLANT,

vs.

CITY OF GALVESTON, BAYLISS E. HARRIS, J. E. PEARCE,  
ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF TEXAS

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[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS, GALVESTON DI-  
VISION

No. 65. In Equity

BEN E. HAYMAN

vs.

CITY OF GALVESTON et al.

PREEIPE FOR TRANSCRIPT OF RECORD—Filed May 20, 1925

Hon. L. C. Masterson, Clerk U. S. District Court, Galveston, Texas.

DEAR SIR: In preparing the record in the above entitled cause, on appeal to the Supreme Court of the United States, please include the following papers and no others:

1. Preeipe for transcript.
2. The original bill in equity of the complainant, Ben E. Hayman, and the exhibit attached thereto.
3. The process issued thereon, showing the return indorsed by the marshal.
4. Plea to the jurisdiction filed by the John Sealy Hospital Board.
5. Answer of the defendants composing the John Sealy Hospital Board.
6. Plea to the jurisdiction and answer filed by the City of Galveston and the mayor and commissioners of the City of Galveston.
7. The decree of the Court.
8. The petition for appeal and the order thereon.
9. The assignment of errors filed herein.
10. The bond on appeal.

[fol. 2] 11. The citation on appeal and the return of the marshal thereon.

12. The certificate of the U. S. District Clerk to the above.

Very respectfully, Campbell, Myer & Simmons, Attorneys for Appellant.

This is to acknowledge receipt of a copy of the appellant's preeipe this the 20th day of May, A. D. 1925.

Mart H. Royston, Attorney of Record for Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy, and M. L. Graves, Composing the John Sealy Hospital Board. Bryan F. Williams, Attorney of Record for City of Galveston, Bayliss E. Harris, J. E. Pearce, R. P. Williamson, E. M. Owens, and S. L. McCarthy, Mayor and Commissioners, Respectively, of the City of Galveston.

[File endorsement omitted.]

[fol. 3] [Caption omitted]

[fol. 4] IN UNITED STATES DISTRICT COURT

In Equity. No. 65

BEN E. HAYMAN

vs.

CITY OF GALVESTON, BAYLISS E. HARRIS, J. E. PEARCE, R. P. Williamson, E. M. Owens, and S. L. McCarthy, Composing the Board of Commissioners of the City of Galveston; Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy, and M. L. Graves, Composing the "John Sealy Hospital Board."

BILL OF COMPLAINT—Filed November 14, 1924

To the Honorable the Judge of said Court:

Ben E. Hayman, plaintiff, a resident of Galveston County, State of Texas, a resident of said State, brings this, his bill of complaint, against City of Galveston, a municipal corporation, Bayliss E. Harris, J. E. Pearce, R. P. Williamson, E. M. Owens, S. L. McCarthy, Edward Randall, John Sealy and M. L. Graves citizens of said State, and residents of said County of Galveston, and their successors in office.

And, thereupon, your petitioner complains and alleges:

## I

That the defendant, City of Galveston, is, and it was, at all of the times herein mentioned, a municipal corporation, organized and existing by virtue of the laws of the State of Texas, situated in Galveston County, in the State of Texas, and that the defendants, Bayliss E. Harris J. E. Pearce, R. P. Williamson, E. M. Owens, and S. L. McCarthy, are the Mayor and Commissioners, respectively, of said City of Galveston, duly elected and qualified as such, and as [fol. 5] such Mayor and Commissioners, compose the Board of Commissioners of said city; and that the defendants, Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy and M. L. Graves, are, and were, at all of the times herein mentioned, members of, and composing, the "John Sealy Hospital Board" hereinafter mentioned.

## II

That the plaintiff is, and was, at all of the times herein mentioned, a resident of the City and County of Galveston, Texas, and a graduate of the College of Osteopathic Physicians and Surgeons, of Los Angeles, California, and duly licensed to practice as a physician and surgeon under the laws of the State of Texas, and that his said license is, and was, at all of the times herein mentioned, filed and recorded

in the office of the County Clerk of Galveston County, Texas, as required by the laws of said State.

### III

That on or about the 9th day of May, 1913, the State of Texas, acting by and through the Board of Regents of the University of the State of Texas, by an instrument in writing, and for and in consideration of the rents, covenants and considerations therein contained, to be paid and performed by the City of Galveston, duly granted, demised and leased to the defendant, City of Galveston, for the purposes of a public hospital, certain property and premises situated in said city, known as the "John Sealy Hospital", and that annexed hereto, marked "Exhibit A", and made a part hereof, is a copy of said written contract of lease.

### IV

That upon the execution and delivery of said lease, the defendant City of Galveston, took exclusive possession of the lands, buildings, improvements and appurtenances thereto belonging and thereon situated, and entered upon the performance of said contract of lease upon its part to be performed, and has used, and is still in exclusive possession [fol. 6] thereof, and is using said property, equipment and appurtenances exclusively for public hospital purposes.

### V

That on or about the month of May, 1923, and in the manner provided in the seventh paragraph or sub-division of said written contract of lease, the defendants, Edward Randall, M. L. Graves, R. P. Williamson and John Sealy, were elected and appointed as members of the Board of Managers of said John Sealy Hospital, and in the year 1924, the defendant J. E. Pearce, was, in the same manner, elected and appointed a member of said Board, said defendants being known and designated as "John Sealy Hospital Board;" that all of said defendants were, and are, residents of said City of Galveston.

### VI

That said John Sealy Hospital is, and was, at all of the times herein mentioned, exclusively supported and maintained from appropriations of moneys raised by taxation in said city, and from the fees charged to, and paid by, patients for hospital accommodations and service at said hospital, which said fees become, and are, a part of the general revenues of said city, and from voluntary donations by private citizens, and that the State of Texas neither contributes or donates moneys by taxation or otherwise to its support or maintenance, and that said hospital is, and it was, at all the times herein mentioned, a public institution, maintained by said defendant city, as aforesaid, for the accommodation of all charity.

patients assigned thereto for admission by the Health Officer of the City of Galveston, and also for patients who are ready, able and willing to pay for hospital services and accommodations, all of which said patients are entitled to be received into said hospital under such reasonable rules and regulations as may from time to time be prescribed by said hospital board, and without discrimination against patients who desire to be treated by the plaintiff and other osteopathic physicians, and the public interests of said city and its tax payers require that all patients desiring to enter said hospital be admitted thereto without discrimination against patients desiring to be treated by the plaintiff and other osteopathic physicians and surgeons, and in favor of the graduates of allopathic and homeopathic medical schools and colleges.

That the members of the said "John Sealy Hospital Board," defendants aforesaid, have no right, power or authority to pass or enact any rule or regulation relating to the admission of patients to said hospital, discriminating against patients who desire to be permitted thereto, and treated, by the plaintiff and other osteopathic physicians and surgeons, and have no power or authority to pass any rule or regulation excluding the plaintiff and other osteopathic physicians and surgeons from treating patients at said hospital, who desire treatment by said school of physicians and surgeons.

## VII

The plaintiff believes, and has reason to believe, that the defendant, Edward Randall, is duly licensed to practice as a physician and surgeon under the laws of the State of Texas, and is a graduate of allopathic medical schools, other than osteopathic schools and colleges, and the plaintiff is informed and believes, and has reason to believe, that the said defendant, Edward Randall, is prejudiced against the graduates of osteopathic schools and colleges, and physicians and surgeons, including the plaintiff, who are practicing osteopathic medicine and surgery; that the said defendant, Edward Randall, is the president of the "John Sealy Hospital Board," and controls, or assumes to control, the subordinate officers and employees of said hospital, and issues to them instructions for the admission of patients to said hospital.

## VIII

The plaintiff is informed and believes, and has reason to believe, that the said defendants composing said "John Sealy Hospital Board," have enacted and promulgated rules and regulations, and have issued instructions to the officers and employees of said hospital, pursuant thereto, denying admission to said hospital of patients, ready, able and willing to pay for hospital services and accommodations therein, and who desire to be treated by the plaintiff and other osteopathic physicians and surgeons, and denying charity patients the right to be treated by the plaintiff and other physicians and surgeons of said school, and discriminating against

said patients and denying the right of the plaintiff and other osteopathic physicians and surgeons the right to treat such patients at said hospital, which said rule or regulation discriminates against the plaintiff and other osteopathic physicians and surgeons, and in favor of the graduates of medical schools and colleges, known as allopathic and homeopathic schools, and the plaintiff alleges, in this connection, that pursuant to said rules and regulations, and instructions to the officers and employees of said hospital, the plaintiff has been prevented from treating patients at said hospital, and patients ready, able and willing to pay for hospital services and accommodations therein, and who desire to be treated by the plaintiff, were denied admission to said hospital, because said patients desired to be treated by the plaintiff, who is an osteopathic physician and surgeon, and the defendants, and the officers and agents of the said hospital, will in the future, continue said discriminatory rule and regulation against the plaintiff and other osteopathic physicians and surgeons, and that plaintiff will, in the future, be prevented from practicing his profession at said hospital, as hereinabove set forth, and by reason of all the foregoing, the plaintiff has been damaged in the sum of \$3,500.00.

That the right of the plaintiff to practice his said profession is a valuable property right, and said discriminatory rule or regulation, and enforcement thereof, as hereinbefore alleged, amounts to the taking of his property without due process of law, and injures the [fol. 9] plaintiff in the practice of his said profession, in violation of his constitutional rights and the constitutional rights of patients desiring to be treated by him, and by reason of all of the aforesaid, the plaintiff has been, and will in the future be, excluded from practicing his profession as a physician and surgeon in said hospital, and treating the patients therein who desire to be treated by him, and unless the defendants, and each of them, are restrained by an order of this Court from continuing to enforce such discriminatory rule, regulation and practice, as hereinbefore set forth, the plaintiff will, in the future, continue to be excluded from practicing his profession in said hospital, and on account of all of which, the plaintiff has suffered, and will continue to suffer, great and irreparable damage and injury, for which he will have no adequate remedy at law.

That this is a suit arising under the Constitution of the United States, in which the matter in controversy exceeds the sum or value of \$3,000.00.

In consideration whereof, without remedy under the rules of the common-law, to have adequate relief only in a court of equity, plaintiff prays that writ of subpena be issued to defendants, commanding them, and each of them, to appear in this court at some certain date to be named therein, to answer in the premises, answer under oath being expressly waived, and that upon final hearing hereof, said defendants, and each of them, and their successors in office, be perpetually enjoined and restrained from enforcing, or attempting to enforce, any rule or regulation which will exclude

osteopathic physicians and surgeons, and especially this plaintiff, from practicing his and their professions of osteopathic physicians and surgeons in the John Sealy Hospital, and from denying admission to said hospital of charity patients, and patients ready, able and willing to pay for hospital services and accommodations therein, and who desire to be treated by the plaintiff and other osteopathic physi- [fol. 10] cians and surgeons, and discriminating against the said patients, or in any other manner whatsoever discriminating against the plaintiff and other osteopathic physicians and surgeons in the practice of their profession at said hospital, and that the plaintiff have judgment against the defendants, and each of them, in the sum of \$3,500.00 damages, and that the plaintiff have a decree of such further and other relief, as the case may require, as well as for all costs.

Frank S. Anderson, Attorney for Plaintiff.

*Duly sworn to by Ben E. Hayman. Jural omitted in printing.*

[fol. 11]

EXHIBIT TO BILL OF COMPLAINT

THE STATE OF TEXAS,  
County of Galveston:

This indebtedness made and entered into this the 9th day of May, 1913, by and between the State of Texas, acting by and through the Board of Regents of the University of the State of Texas, party of the first part, and the City of Galveston, acting by and through its Mayor-President of the Board of Commissioners of the City of Galveston, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the rents, covenants and conditions hereinafter contained, and by said party of the second part to be paid and performed, doth hereby grant, demise and lease to said party of the second part the following described property and premises situated in the City of Galveston, County of Galveston, State of Texas, to wit: That certain piece or parcel of land, with the buildings, improvements and appurtenances thereto belonging and thereon situated, which upon the Galveston City Company's map of the plan of the said city, is designated, distinguished and described as Block number six hundred and sixty-eight (668); to have and to hold the herein and hereby demised property and premises, with tenements, buildings, rights, privileges and appurtenances, unto the said party of the second part for and during the full term of twenty-five years next ensuing, and fully to be completed and ended on the 9th day of May, A. D. 1938, yielding and paying therefor, during said term, an annual rent of one dollar (\$1.00), payable on the first day of January of each and every year during said term of twenty-five years, and upon the following covenants, conditions and stipulations, that is to say:

First. That the City of Galveston will use said property exclusively for hospital purposes; and the hospital shall be known as the "John Sealy Hospital."

Second. That the said city will provide all officers and employes, [fol. 12] and will furnish and equip the buildings used for hospital purposes with all furniture, stores, medicine, and appliances, necessary to make the same, in appointment and equipment, a first class hospital, for the treatment and care of sick, wounded and disabled persons, and will maintain the same as such during said term of twenty five years, free of cost and expense to the State of Texas; provided, however, that this shall not apply to the visiting medical or surgical staff of said hospital, who shall hereafter be provided and designated by the Board of Regents of the University of the State, and who shall serve gratuitously.

Third. That the said city will, at its own expense, keep the buildings, and each and every one of them, insured in reliable insurance companies, against loss or damage by fire, in an amount equal to two-thirds of their estimated insurance value at the successive periods of taking out the policies on the same; the policies always to be made payable to the Board of Regents of the University, for the State; the insurance money, however, when collected, to be, with the least possible delay, expended and paid out by the Board of Regents for the repair, restoration and rebuilding of said buildings and every portion thereof, and each and everything pertaining thereto, the property of the State, that may be injured or destroyed by fire,—such repairs or re-building to be fully equal in all respects to the buildings as originally built and constructed, and to be done and completed with the least possible delay, so that the City of Galveston may not be deprived of the use of the same as a hospital, longer than may be necessary to the execution of such repairs or restoration.

Fourth. That the said city will, during said lease, at its own cost, well and sufficiently keep and maintain in good and substantial repair and condition, said premises, the reasonable use and wear thereof, loss and damage by fire, and total or partial destruction by the other elements, in the meantime, only excepted.

[fol. 13] Fifth. That the State reserves the right, through the Regents of the University, or their authorized agents, at any and all times, to enter upon said premises, and to alter, add to, and otherwise improve, the said buildings and premises, at the expense of the State, the better to make the said "John Sealy Hospital" subserve the purposes of a Medical Hospital to the Medical Department of the State University; provided, however, that in so doing, the use of said premises by the City of Galveston, for the purpose declared in said lease, shall, at no time during the continuance of said lease, be materially interrupted or impaired.

Sixth. That the State, through the Board of Regents of the University, reserves the right of use, by the Faculty of the Medical Department, of the operating amphitheatre, the wards, and the grounds

of said hospital property, for the purposes of, and so far as may be necessary to, the clinical instruction of students attending the Medical College of the State, located at Galveston, also the right, for such purposes, to the special conduct of the treatment of all charity patients in said hospital. And the said city hereby agrees to furnish all the facilities that the said hospital may afford for the legitimate clinical and other teaching of the students attending the said Medical Department, and also to place at the disposal of the Faculty of the Medical Department, as far as may be required by said Faculty, for dissecting, pathological and other purposes of instruction, the dead bodies of all charity patients who may die in said hospital, and of which the said city may have the right of disposition.

Seventh. The "John Sealy Hospital" shall, so long as the same is under lease from the State of the city, be under the exclusive control of a board of managers to be known as the "John Sealy Hospital Board," and to consist of five members to be chosen or appointed as hereinafter provided every two years, and within thirty days after the installation of each new Board of Commissioners. Two of the members of the said hospital board shall be selected from said Board of Commissioners, two to be named or selected by the Board of [fol. 14] Regents of the University of the State, and the fifth member to be named or selected by these four; provided, however, that all members of said John Sealy Hospital Board shall be resident citizens of said City of Galveston, and provided, further, that in case of a majority of said four cannot agree upon the fifth member, then such fifth member shall be named or designated by the President of the Board of Commissioners. The said John Sealy Hospital Board shall have the exclusive right to appoint the superintendent, steward, matron, nurses and such other subordinate officers and employees of said hospital as may be required for properly carrying on or conducting the same; to designate the duties of such subordinate officer and employees; to determine their salary and compensation, and change the same, and to suspend or discharge them; provided, always, that the said hospital board shall in no event exceed in any one year in their expenditures the annual allowance set apart by the Board of Commissioners for defraying the expenses thereof; and the said Board of Commissioners, as long as said hospital is under lease from the State to the said city, or is in any way responsible for such expenses, shall have the exclusive right to determine and regulate the amount to be expended in carrying on or in conducting the said hospital. The said John Sealy Hospital Board shall have the exclusive right to prescribe rules and regulations for the management and conduct of the hospital, and shall have the exclusive management and control of its internal government. The Health Physician of said city shall have the sole and exclusive right and authority, whilst the city is such lessee, to determine and designate what person or persons may be admitted as charity patients into said hospital. Patients who pay for hospital services rendered them may, however, be received into said hospital under the rules and regula-

tions to be prescribed by said Hospital Board; provided, always, that applications for admittance into said hospital for treatment as charity patients, with written permits to that effect signed by the Health [fol. 15] Physician of the City, shall have precedence over all others applying for admittance therein.

The financial affairs of said hospital, so long as the City of Galveston is such lessee, shall be under the exclusive control of said Board of Commissioners, and the said Hospital Board shall furnish to said Board of Commissioners, at its regular meeting in February of each year during said lease, an itemized statement or estimate of the various officers and assistants and the nurses and other employees and their salaries and wages, and the nature and amount of all other expenses necessary to the proper management and maintenance of said hospital for the twelve months next thereafter ensuing, which statement or estimate shall be subject to revision, alteration, modification and reduction by said Board of Commissioners, and no expense or liability not provided for in said estimate or statement as finally approved and adopted by said Board of Commissioners shall be incurred by said Hospital Board, or any subordinate in the management of said hospital, unless the approval of the Board of Commissioners in that regard have first been obtained. All moneys or revenues arising from hospital service in said institution during such lease shall, as collected, be paid into the city treasury of the revenue of said city. The said Hospital Board shall keep and preserve or cause to be kept and preserved, in well-bound books, accurate minutes of its meetings and proceedings; also, in like manner a roster of all physicians and surgeons, and all officers, employees and internes of said hospital, and in which capacity serving, with dates of entering service and of discharge therefrom, length of time employed and salaries and wages allowed; and also hospital register, showing name, age, sex, nationality and residence of each and every person admitted as a patient, disease at the date of admittance or supervening while in hospital, dates of admittance, dates of discharge or death of all patients admitted into said hospital for treatment, the authority for the admittance of each patient, and the rate charged each and [fol. 16] every patient. And the superintendent or other officer in charge of said hospital shall keep, cause to — kept, in well-bound books, correct and accurate accounts of all receipts and disbursements for account of said hospital and shall render, under oath, to the said Board of Commissioners, through the said Hospital Board, monthly reports or statements showing, for the month then ending, all receipts and disbursements, with proper voucher; also the number and names of all patients received, the respective dates of admittance, and whether charity patients or pay patients; the number and names of all patients that have been discharged or have died during the month; the disposition made of the bodies of all patients who have died during the month, and the names of all officers and employees, in what capacity serving, and what salary or wages, respectively.

The medical staff of the John Sealy Hospital shall be constituted of the superintendent, to be selected as above provided, and during

said lease compensated by the city, of the visiting physicians and surgeons to be designated by the Board of Regents of the University of the State of Texas from the faculty of the medical department thereof, but who are to receive no compensation from the city for their services, and of two or more students from the medical branch of said University to serve as internes and to be selected by said Board of Regents, the number and duties of the internes to be determined by said hospital board, and said internes to receive for their services only their board and lodging in said hospital. The officers in charge of said hospital shall at all times admit for the purpose of inspection any member of the Board of Commissioners, or any person charged with the duty of visiting or inspecting said hospital, and in like manner the Regents of the said University or their authorized agents. All the members of said Hospital Board, as also the superintendent shall, before entering upon their respective duties, take the oath of office as prescribed by the Constitution of the State of Texas.

[fol 17] Eighth. The contract of lease dated October 7, 1889, made and entered into by and between the parties herein of the first part, of the one part, and the party herein of the second part, of the other, for the premises hereby demised, which by its terms would expire on October 7, 1914, is hereby, by mutual consent, cancelled, this present contract of lease being made and executed in substitution for and in renewal of said contract of lease dated October 7, 1889.

The party of the second part agrees and binds itself to make yearly adequate appropriations for the care of the indigent sick of said city in the John Sealy Hospital and for the maintenance, support and operation of the said John Sealy Hospital during the full term of this lease.

Ninth. It is mutually agreed between the parties hereto that any difference which may arise concerning the meaning or construction of any part of this agreement, or any of the terms thereof, shall be referred for arbitration and settlement to the John Sealy Hospital Board as the same may then be constituted; it being understood that said Board will always consist of the members selected as now provided for by Section Thirty-Three of the Charter of the City of Galveston, and all questions concerning the construction of this agreement shall be referred to said Board, and the decision of a majority thereof shall be final and binding on both of the parties hereto, and from such decision no appeal shall be had or any proceeding taken thereon.

Tenth. That the City of Galveston reserves the right, at the expiration of the twenty-five years mentioned in this lease, or should the said lease for any reason sooner terminate, then upon such termination, to remove from said buildings and grounds all furniture, appliances, apparatus, of whatever nature and description, that may have been placed therein by the said city at its own cost and expense or for its account.

Eleventh. On the expiration of said lease, the City of Galveston, [fol. 18] its Board of City Commissioners or other governing body so desiring, shall have the right to renew this lease for a like term of years and upon the like terms and condition, by giving notice to the party of the first part or their successors in office of such intention or desire at least six months before the expiration of this lease.

In testimony whereof the party of the first part has caused these presents to be executed in its name by its vice-chairman, its chairman being absent, and attested by its secretary under its corporate seal and the party of the second part has caused the same to be executed in its name by the Mayor-President of the Board of Commissioners, attested by the secretary of said Board with its corporate seal, on this the 9th day of May, 1913, this lease being executed in duplicate.

Board of Regents of the University of Texas, by F. W. Cook,  
Vice-Chairman. Attest: E. J. Mathews, Secretary. (Seal.)  
City of Galveston, by Lewis Fisher, Mayor, President of  
Board of Commissioners of the City of Galveston. Attest:  
Jno. D. Kelley, Secretary of Board of Commissioners of  
City of Galveston.

Approved as to form: Mart H. Royston, City Attorney.

[File endorsement omitted.]

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[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

#### ANSWER OF JOHN SEALY HOSPITAL BOARD—Filed Dec. 13, 1924

Now comes the John Sealy Hospital Board, composed of Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy and M. L. Graves, who appear herein solely in their capacity as members of such Board, and would respectfully show that this Honorable Court is without jurisdiction to hear or entertain this suit for the reasons:

(a) It appears from the petition filed by the plaintiff herein, and the exhibits attached thereto, that this is a suit against officers of the State of Texas, and is therefore in effect a suit against the State of Texas, and that said petition does not allege any consent or authority granted by the State of Texas for such suit.

(b) Because it appears from said petition that the plaintiff is a citizen and resident of the State of Texas, and that these defendants are officers of the State of Texas, and is an attempt to supervise the conduct of persons charged with official duty, and to control them as against the political power in the administration of the affairs of the State of Texas.

Wherefore, premises considered, these defendants pray judgment whether this Honorable Court can or will take further cognizance of this suit.

W. A. Keeling, Attorney General; Eugene A. Wilson, Assistant [fol. 20] Attorney General; Mart H. Royston, Attorneys for Defendant John Sealy Hospital Board.

And the said defendant, the John Sealy Hospital Board, composed of Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy and M. L. Graves, who appear herein solely in their capacity as member of such Board, and specially excepting to the petition of plaintiff filed herein, would respectfully show to the court that these defendants in their said capacity specially except to said petition, and show unto the court that the said petition, and exhibits attached thereto, show this to be in legal substance and effect a suit against the State, whose consent to be sued is nowhere shown.

Further excepting, these defendants in their said capacity show to the court that the matters and things alleged in said petition are insufficient in law or in equity to entitle them to the relief sought; all of which they pray judgment.

And these defendants, if required to make further answer in their said capacity, deny all and singular the allegations of said petition and demand strict proof thereof.

\_\_\_\_\_, Attorney General; \_\_\_\_\_, Assistant Attorney General, Attorneys for Defendant John Sealy Hospital Board.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Dec. 13, 1924

Now come the defendant, the City of Galveston, and Bayliss E. Harriss, J. E. Pearce, R. P. Williamson, Ed. M. Owens and S. L. McCarthy, the Mayor and Commissioners, respectively, of said City of Galveston, and answering plaintiff's petition filed herein say that this court is without jurisdiction to hear and entertain said cause for the reason that it appears from said petition, and exhibits attached thereto, that the defendant the John Sealy Hospital Board and the defendants Edward Randall, R. P. Williamson, J. E. Pearce, John Sealy and M. L. Graves who constitute the members of said John Sealy Hospital Board, are officers of the State of Texas, and that the relief sought in said petition is in effect an attempt to regulate and supervise the conduct of persons charged with official duty in a proceeding in which the State, as a State, is not and cannot be made a party, and that the plaintiff is a citizen and resident of Galveston County, State of Texas, and that all of the defendants are citizens and residents of the State of Texas.

Wherefore, these defendants pray judgment whether this Honorable Court will retain jurisdiction of this cause.

Bryan Williams & Mart H. Royston, Attorneys for the City of Galveston and the Members of the Board of Commissioners of City of Galveston.

[fol. 22] And said defendants, the City of Galveston, and Baylis E. Harriss, Mayor-President, and R. P. Williamson, S. L. McCarthy, Ed. M. Owens and J. E. Pearce, members of the Board of Commissioners of the City of Galveston, defendants in the above numbered and entitled cause, except to plaintiff's petition filed herein and say that the same is insufficient in law. And of this they pray the judgment of the court.

And the said defendants, specially excepting to the petition filed herein, by plaintiff, say that the same is insufficient in law for this:

1. Because it appears from plaintiff's petition, and exhibits made a part thereof, that the City of Galveston is a municipal corporation duly existing under the laws of the State of Texas, and that the defendants Baylis E. Harriss, R. P. Williamson, S. L. McCarthy, Ed. M. Owens and J. E. Pearce are officers of the said corporation, and that in the operation of the John Sealy Hospital, said City of Galveston, and its officers, are discharging a governmental duty under the authority granted by the legislature of the State of Texas, and plaintiff's petition shows that the exclusive management and control of said John Sealy Hospital is not lodged in or with the City of Galveston nor in or with the officers of the City of Galveston, but the exclusive management and control of said institution is placed in a Board of Managers created by the Act of Legislature of the State of Texas, and known as the John Sealy Hospital Board, and that said Board so constituted are officers of the State, and as such are not subject to suit, and the defendant, City of Galveston, and its officers, as such, are not charged in said petition with the wrongs, injuries and trespasses therein set forth.

2. Because it appears from said petition that this is a suit to enjoin the officers of the State of Texas and officers of the City of Galveston in the discharge of their discretionary duties.

3. Because it appears from said petition and its exhibits, that [fol. 23] the City of Galveston, and its officers, to-wit, Baylis E. Harriss, Mayor-President, and R. P. Williamson, S. L. McCarthy, Ed. M. Owens and J. E. Pearce, members of the Board of Commissioners of the City of Galveston, are neither necessary nor proper parties to this suit.

4. Because it appears from said petition that the same is an application for a writ of injunction to enjoin the defendants named herein in the exercise of official discretion and of political and of governmental power, and is therefore a suit against the State, and cannot be so maintained.

And of these exceptions, these defendants pray the judgment of the court.

Bryan F. Williams, Mart H. Royston, Attorney for City of Galveston, and Bayliss E. Harris, Mayor-President, and Members of the Board of Commissioners of the City of Galveston.

And without waiving the foregoing plea to the jurisdiction and exceptions, the defendants, City of Galveston, and Bayliss E. Harris, Mayor-President, and R. P. Williamson, S. L. McCarthy, Ed. M. Owens, and J. E. Pearce, members of the Board of Commissioners, deny the allegations contained in plaintiff's petition and demand strict proof thereof; and of this they put themselves upon the country.

And specially answering said petition, said defendants say that the John Sealy Hospital belongs to and is the property of the State of Texas, that heretofore by an Act of the Legislature of the State of Texas, known as Chapter 38 of the Special Laws of the Twenty-Eighth Legislature, the City of Galveston, and the Board of Commissioners of the City of Galveston were authorized and empowered to enter into a lease with the Board of Regents of the University of the State of Texas, for the hospital known as the John Sealy Hospital, and that said Act of the Legislature and the lease executed by [fol. 24] virtue thereof, provided that operation of said property, and of said John Sealy Hospital should be under the exclusive control of a Board of Managers created by said Act, which said Board was named the John Sealy Hospital Board, and that said John Sealy Hospital Board has the exclusive right to appoint the house surgeon, steward, matron and nurses, and such other subordinate officers and employees of said hospital as may be required for properly carrying on and conducting the same, and to prescribe the duties of such subordinate officers and employees, and to have the exclusive right to prescribe the rules and regulations for the management of the hospital, and control of its internal government. That the rules and regulations governing the John Sealy Hospital are reasonable and well enacted by the John Sealy Hospital Board in the exercise of its discretionary powers and are such rules and regulations as are necessary for a hospital of the first class.

That under the terms of the lease referred to in plaintiff's petition, the State of Texas reserved the right through its agents at any and all times to enter upon the premises and to alter, add to or otherwise improve the buildings or premises at the expense of the State, to make the said John Sealy Hospital subserve the purposes of a Medical College Hospital to the Medical Department of the State University.

The John Sealy Hospital is the property of the State of Texas, and a part of the University of the State of Texas, and that the Board of Regents of the University of the State of Texas has established a Medical Branch of said University at Galveston, Texas, and that as a part of said Medical Branch of the University of Texas, it was

and is absolutely necessary that a Medical Hospital be conducted in connection with said Medical College for the purpose of teaching medicine, and that the said John Sealy Hospital is a Medical Hospital used and operated in connection with and as a part of the Medical Branch of the University of the State of Texas, and that the [fol. 25] State of Texas, acting through its officers, does not teach nor instruct in its school of medicine osteopathy, but that said Medical Branch of the University of the State of Texas is an allopathic school, and that the rules and regulations of said John Sealy Hospital were enacted for the purpose of standardizing said hospital for the purpose of building up the standards and increasing the knowledge and efficiency, and enlarging the sphere of usefulness of the regular medical profession and multiplying its service to the sick and suffering world.

Wherefore, these defendants pray that upon a hearing of said cause, judgment be rendered in their behalf, and that the plaintiff take nothing by his said suit, and that his prayer for an injunction or mandamus be denied, and for costs, and for such other further relief, both general and special, as to the court may seem proper.

Bryan F. Williams, Mart H. Royston, Attorney- for City of Galveston, Mayor-President Bayliss E. Harris, and R. P. Williamson, S. L. McCarthy, Ed. M. Owens, and J. E. Pearce, Members of the Board of Commissioners, defendants.

[File endorsement omitted.]

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[fol. 26]            IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT—Filed April 14, 1925

It appearing to the Court upon motion to dismiss in this case, that plaintiff's bill is without equity, and same is dismissed.

Houston, Texas, April 13, 1925.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

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[fol. 27]            IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed May 20, 1925

To the Honorable J. C. Hutcheson, Jr., Judge of the United States District Court for the Southern District of Texas:

The above named plaintiff, Ben E. Hayman, feeling aggrieved by the decree rendered and entered in the above entitled and numbered

cause on the 13th day of April, A. D. 1925, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security for costs on appeal to be required of him be made.

Campbell, Myer & Simmons, Attorneys for Ben E. Hayman,  
Plaintiff.

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[fol. 28] IN UNITED STATES DISTRICT COURT

**ORDER ALLOWING APPEAL—Filed May 20, 1925**

On motion of D. A. Simmons, of counsel for complainant, Ben E. Hayman, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond for costs on appeal be fixed at the sum of \$250.00/100.

Dated May 19, 1925.

J. C. Hutcheson, Jr., Judge.

[File endorsement omitted.]

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[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

**ASSIGNMENTS OF ERROR—Filed May 20, 1925**

Now comes the plaintiff in the above entitled and numbered cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in this cause, from the decree made by this Honorable Court on the 13th day of April, A. D. 1925.

1

That the Court erred in sustaining the motion to dismiss, and in dismissing plaintiff's bill for want of equity.

2

That the Court erred in failing to conclude as a matter of law, that the plaintiff, a physician and surgeon duly licensed under the

laws of the State of Texas, has been and is being deprived of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that the defendants, as state officers, have made rules and regulations admitting to practice in a public hospital only those physicians and surgeons who are graduates of allopathic schools and who practice allopathic medicine and surgery, and excluding plaintiff and other duly licensed physicians and surgeons who practice osteopathic medicine and surgery.

## 3

That the Court erred in failing to conclude as a matter of law, [fol. 30] that the plaintiff's right to practice his profession in the John Sealy Hospital, a public hospital supported by the City of Galveston and by private charge to patients who use the same, is a valuable property right, and the action of the defendants as state officers, denying to plaintiff the equal right to practice therein as a physician and surgeon, deprives him of his property without due process of law, and denies to him the equal protection of the law, in violation of his rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

## 4

That the Court erred in failing to find as a matter of law, that persons ready, able and willing to pay for hospital accommodations in the John Sealy Hospital, and who apply for same when rooms are available, and who desire the services of plaintiff, or of any other reputable physician and surgeon—whether such physician and surgeon practices osteopathic medicine and surgery or allopathic medicine and surgery—are entitled to receive accommodations in said hospital and to employ the plaintiff or any other reputable and duly licensed physician and surgeon of their choice.

## 5

That the Court erred in failing to find as a matter of law that charity patients in said public hospital who desire the services of plaintiff or any other duly licensed physician and surgeon, are entitled to receive such service in the said hospital without regard to whether the said physician and surgeon practices osteopathic medicine and surgery or allopathic medicine and surgery.

## 6

That the Court erred in failing to find as a matter of law that the plaintiff was and is entitled to the relief prayed for in his petition herein.

Wherefore the appellant prays that the decree heretofore entered [fol. 31] by the District Court of the Southern District of Texas on April 13, 1925, in this cause be reversed.

Campbell, Myer & Simmons Attorneys for Appellant Ben E. Hayman.

[File endorsement omitted.]

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[fols. 32-34] BOND ON APPEAL FOR \$250.00—Approved and filed May 23, 1925; omitted in printing

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[fol. 35] In UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of record, assignment of errors, and all proceedings in the case, as called for in the Precipe for Transcript, on page 1 of said Transcript, in cause No. 65 on the Equity Doeke of said Court, entitled [title omitted], on file and of record in my office.

To certify which, witness my hand and seal of said Court, at Galveston, in said District, this the 4th day of June, A. D. 1925.

L. C. Masterson, Clerk U. S. District Court, Southern District of Texas, by G. Predecki, Deputy. (Seal of United States District Court, Southern District of Texas.)

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[fol. 36] CITATION—In usual form, showing service on Bryan Williams and Mart H. Royston; filed June 4, 1925; omitted in printing.

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Endorsed on cover: File No. 31,291. S. Texas D. C. U. S. Term No. 568. Ben E. Hayman, appellant, vs. City of Galveston, Bayliss E. Harris, J. E. Pearce et al., etc. Filed June 29, 1925. Filed No. 31,291.